## United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

## Advice Memorandum

DATE: August 14, 2008

TO : Martha Kinard, Regional Director

Region 16

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: Dell, Inc. 518-5018-

3300 Case 16-CA-26234 524-8393-

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524-8393-5088

This Register-Guard<sup>1</sup> case was submitted for advice on whether the Employer violated Section 8(a)(1) and (3) by terminating an employee for sending a non-work related, "mass" email to 600 employees. We agree with the Region that there is no evidence that the Employer has discriminated against the Charging Party because of the email's content.

## FACTS

The Employer, Dell, is the largest manufacturer of personal computers and maintains several technical support and call centers, including centers in Round Rock, Texas, and Twin Falls, Idaho. The Employer employs about 700 customer service delivery technicians at these locations.

Charging Party Calvin Baker worked as a technician at the Round Rock location from January 1998 until his May 2008 termination. Baker was considered an average employee until mid-2007, when he was transferred to a new supervisor and his performance ratings began to decline. Around December 2007, Baker began researching unions at home and on his work computer at lunch and on breaks.

In January 2008, the Employer placed Baker on a performance improvement plan (PIP). In February 2008, Baker posted a pamphlet on the "Four Stages of Organizing" on his cubicle wall. No one said anything to him about it.

On May 1, 2008, Baker sent an email from his work computer to 600 technicians in Round Rock and Twin Falls soliciting them to consider joining a union:

 $<sup>^{1}</sup>$  The Guard Publishing Co., d/b/a The Register Guard, 351 NLRB No. 70 (2007).

I am trying to gather information on the top 5 issues you believe need to be changed here at Dell . . . These can be any issues you feel strongly about. Example: Do you want more of a voice in what benefits you get, what they cover and how much you pay for them? Do you want more of a voice in your pay? Do you want more of a voice in how much vacation/PBA you get and when you get it? Do you want more of a voice in your work conditions? Do you want more of a voice in your shift schedule? Please note the previous are suggestions, you may have other areas of concern. Please be as specific as you can. When you are done, please include the answer to these questions, If joining a Union would give you a better opportunity to address your issues would you join a Union? Are you aware that being a member of a Union may provide you with more legal rights as an employee?

\*\*\*To keep your responses a little more confidential please reply to me only do not reply to everyone\*\*\*

Baker sent the email to a distribution list that included numerous supervisors and managers.

On May 8, the Employer discharged Baker. At his termination meeting, he was presented with a copy of the email and asked if he sent it. When he acknowledged sending it, the Employer's human resources representative told him that the email violated a number of their policies. The representative told him that she understood he was under a PIP and then terminated him. The Employer claims that Baker was discharged for sending a mass, nonwork related email and for poor performance.

The Employer's email policy provides that "occasional personal use" of email and computers "is permitted but must be kept to a minimum."

The solicitation/distribution policy prohibits solicitation for nonbusiness purposes during working time and the distribution of materials for nonbusiness purposes during work time in any area and in work areas at any time. This policy also explicitly prohibits using Dell resources, including its computer email, to solicit employees or distribute for nonbusiness purposes. Another provision

provides that "[e]mployees may not engage in solicitation of other employees while they or the other employees are working." The policy provides that violations "may result in disciplinary action, up to an including termination of employment."

Another policy, entitled, "Misuse of Company Resources," provides as follows:

The unauthorized use or possession of Dell assets for unapproved or nonbusiness purposes; violation of Dell's policies regarding business and accounting practices, political contributions, giving gifts, vendor relations, government contracts, alcohol purchases, use of IT resources, and software and hardware licenses. This includes the excessive or unauthorized use or accessing of nonbusiness related data including, but not limited to, the downloading of material from the internet or using the internet/intranet for non-business purposes.

Baker asserts that for years, he was part of an internal committee called the Tech Council, pursuant to which he sent out several workplace surveys to employees that he would later discuss with management. Baker claims that the May 1 email was similar in nature.

The Employer asserts that it was planning on terminating Baker for failing his PIP but that it had yet not had a chance to gather supporting documentation and prepare the paperwork. Once the mass email was sent, the Employer asserts that HR conducted an investigation because unsolicited mass emails violate a number of its policies. The Employer claims that during this investigation, it learned that Baker's supervisor had orally counseled him in mid-2007 and January 2008 about personal use of emails. Baker had apparently sent a joke to various team members and received complaints. Baker denies that the Employer had previously counseled him on email use.

Since 2004, the Employer has terminated 184 employees for violating email related policies, including several for sending mass emails. One employee, for instance, was terminated for sending a mass email objecting to the Employer's observance of Gay Pride Month, while another was terminated for soliciting his co-workers to help pay his travel expenses to attend his son's out-of-

state graduation. Two other employees were also discharged for sending mass emails. Several employees were terminated for violating email policies without receiving prior warnings.

## ACTION

We agree with the Region that, absent withdrawal, the charge should be dismissed because there is no evidence of disparate treatment.

In Register Guard, the Board held that employees had no statutory right to use email systems for Section 7 matters and modified Board law concerning discriminatory enforcement.<sup>2</sup> In modifying discriminatory enforcement law, the Board held that unlawful discrimination is disparate treatment of communications of a similar character because of their union or Section 7 status. The Board thus adopted the 7th Circuit's analysis in Fleming Co., and Guardian Industries, 5 where the court distinguished between personal, non-work-related postings on a bulletin board, such as forsale notices and wedding announcements, and "group" or "organizational" postings such as union materials.6 Applying its new standard, the Board majority in Register Guard noted that the employer there had permitted a variety of personal, non-work-related e-mails, but had not permitted e-mails to solicit support for any group or organization. Thus, the employer's enforcement of its policy regarding an employee's e-mails that solicited support for the union did not discriminate along Section 7 lines.

As a threshold matter, we agree with the Region that Baker was engaged in protected, concerted activity when he sent the May 1 email. Baker sent an email to 600 employees seeking to induce group action — union organization. Thus,

<sup>&</sup>lt;sup>2</sup> Id., slip op. at 5, 8.

 $<sup>^{3}</sup>$  Id., at 9.

 $<sup>^4</sup>$  349 F.3d 2968 (7th Cir. 2003), denying enf. 336 NLRB 192 (2001),

 $<sup>^{5}</sup>$  49 F.3d 317 (7th Cir. 1995), denying enf. 313 NLRB 1275 (1994).

<sup>&</sup>lt;sup>6</sup> Register Guard, 351 NLRB No. 70, slip op. at 8-9.

<sup>&</sup>lt;sup>7</sup> See <u>Meyers Industrials (Meyers I)</u>, 269 NLRB 493, 497 (1984).

the Employer violated Section 8(a)(1) and (3) if it fired Baker for engaging in the protected, concerted activity. Since employees generally have no statutory right to use email for Section 7 purposes, Baker's discharge was unlawful if it was discriminatory.

The evidence here revealed no discrimination but rather showed that the Employer has consistently enforced its policies on excessive, inappropriate, and mass emails. We have previously found that Employer rules against mass emails strike a reasonable balance between employees' Section 7 rights and the Employer's legitimate business interest in ensuring the proper functioning of its email system. And where the Employer has terminated 184 employees for violating its email policies within the last several years, including several for sending out mass emails, we find no evidence of disparate treatment.

While Baker claims he sent employee surveys out while on the Tech Council, the Employer claims that the Council were neither authorized nor asked to send such emails, and there is no evidence that the Employer had actual or constructive knowledge of any such emails. In these circumstances, there is no basis to argue that the Employer disparately enforced its policy against the alleged discriminatee. In any case, the Employer created the Tech Council for business purposes related to improving customer service and, thus, if Baker did send such emails, they were arguably business-related. Further, whether Baker was previously counseled for sending personal emails is irrelevant since the Employer provided evidence that it has discharged employees for violating email usage policies even on a first offense. Accordingly, the Employer's employment policies are facially valid, and there is no evidence of disparate treatment.

Accordingly, the Region should, absent withdrawal, dismiss the charge.

B.J.K.

<sup>&</sup>lt;sup>8</sup> See, e.g., <u>The Boeing Company</u>, 19-CA-30745, Advice Memorandum dated September 12, 2007.